No. 16-1498

In the
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF OF *AMICI CURIAE* MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Multistate Tax Commission (the Commission) submits this brief as *amici curiae* in support of the petitioner, the Washington State Department of Licensing (the Department).[1]

The Commission is an intergovernmental state tax agency made up of the heads of the tax agencies for the states that have enacted the Multistate Tax Compact. In addition to the sixteen compact members, states may participate in the Commission's activities as sovereignty or associate members.[2]

The Commission's purposes include facilitating the proper determination of state and local tax liability of multistate taxpayers and promoting uni-

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Washington. This brief is filed with the consent of both parties.

[2] Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

formity or compatibility in significant components of tax systems.[3]

The Federation is the membership organization for state revenue agencies. Previously known as the National Association of Tax Administrators, the Federation has been operating since 1937. The members of the Federation are all 50 states, the District of Columbia, and the cities of New York and Philadelphia. The primary purpose of the Federation is to promote best practices in state tax administration and tax enforcement. The Federation accomplishes this purpose primarily through educational, information-sharing, and other cooperative programs.

This brief will not attempt to parse the relevant historical record or address the rules of construction applicable to Native American treaties. And while we agree with arguments made by the Department and its other *amici*, we do not seek to duplicate them. Instead, we write to make the Court aware of the ongoing work of state tax administrators and taxpayers to create uniform tax systems for collecting and administering fuel and tobacco taxes on products sold across state lines. The Washington Supreme Court's interpretation of the treaty provision at issue here casts a shadow of uncertainty over

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[3] *See* Art. I of the model Multistate Tax Compact, *available at*: http://www.mtc.gov/The-Commission/Multistate-Tax-Compact (last visited Aug. 8, 2018).

that work. We seek greater clarity from this Court about the treaty provision at issue here and we believe, ultimately, the Court must conclude that the Washington Supreme Court's interpretation is fundamentally flawed.

SUMMARY OF ARGUMENT

No one disputes the Ninth Circuit precedent that applies in this case—only how to apply it. If the Washington Supreme Court's ruling is upheld, there is little doubt that other states and other taxes will be impacted, although precisely how is, at this point, anyone's guess. The two taxes most likely to be affected are state fuel and tobacco taxes.

The states' fuel and tobacco tax systems have developed over time to allow tracking of interstate sales and cross-border shipments and to subject these products to tax (and administrative requirements) in the state where they will be consumed, while collecting the tax prior to the final sale. States and taxpayers are continually working to create greater compatibility and consistency in numerous aspects of these systems including record-keeping and reporting—all the elements that have a real and practical effect on compliance and administration.

The respondent has asserted that any effects of the ruling below on these state tax systems can be remedied by the states through legislative amendments to those systems. There is no clear path to achieve such a fix, however, and even if there were, the scope of the treaty right created by the decision

below is so uncertain that any changes states might make would have no guarantee of being effective.

Indeed, serious consideration of the need for greater clarity and where it might come from reveals the fundamental flaw in the Washington Supreme Court's holding—which is that it extends the treaty provision beyond the support of any coherent rationale. We do not believe, therefore, that the Court can both affirm the decision below and provide that clarity. We urge the Court to reject the former, and to do the latter.

ARGUMENT

I. Upholding the decision below will affect other states and potentially other taxes—but will especially impact the states' fuel and cigarette tax systems.

For an eight-month period in 2013, the Department determined that unpaid special fuels and motor vehicle fuel taxes in this case amounted to $3,639,954.61. Joint Appendix, 12a. For two subsequent two-month periods, the amounts due were $1,137,337.68 and $1,129,701.25 respectively. *Id.* at 20a and 24a. The effects on other Washington taxes, as well as on states and their taxes, are much harder to estimate or predict. And that's the problem.

One thing is certain—the treaty language at issue is not geographically bounded.[4] So while the travel provisions at issue in this case are only found in the treaties between the United States and three tribes, the tax implications of the decision could affect every state to the extent those tribes make protected use of roads to conduct trade in those states.[5] The Yakama have, for example, asserted that the treaty travel provision bars New York from enforcing its regulatory scheme for untaxed cigarettes. *New York v. Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 391 (E.D.N.Y. 2013)(noting that New York introduced evidence to rebut the tribal seller's theory that the treaty prohibited the state regulation at issue).

Recognizing the unlimited geographic scope of the treaty, the California State Board of Equalization (the BOE) issued a Tax Opinion in 2011 and acknowledged that the Yakama treaty applies to the use of California roads by the tribe.[6] In that opinion,

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[4] "[T]he right in common with citizens of the United States, to travel upon all public highways." Art. 3, Para. 1, Treaty with the Yakama (1855) (emphasis added).

[5] The right to travel provisions are found in the treaties between the Yakamas, the Flathead and the Nez Percés. Treaty with the Flatheads, 12 Stat. 975 (July 16, 1855, ratified March 8, 1859, proclaimed April 18, 1859); Treaty with the Nez Percés, 12 Stat. 957 (June 11, 1855, ratified March 8, 1859, proclaimed April 29, 1859); Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859).

[6] BOE Tax Opinion 10-475 (March 9, 2011), *available at* https://www.standupca.org/tribal-

the BOE opined, however, that California was not precluded by the treaty from imposing its prepaid sales tax and gasoline and diesel fuel excise tax on a Yakama importer of fuel into California for sale on Native American reservations. The BOE relied on the Ninth Circuit cases implicated in this case. The BOE decision would be overruled should this Court affirm the Washington Supreme Court decision.[7]

There are likely other equally clear examples of the potential impact of the decision on other states as well as theoretical impacts that go far beyond these examples. Suffice it to say, as the dissent below points out, the logic of the Washington Supreme Court decision is by no means limited to fuel or cigarette taxes. That same logic could arguably be extended to any tax imposed on a Yakama business

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gaming/taxation/March%209%2C%202011%20BOE%20Response%20-%20Tribal%20Gas%20Stations.pdf/at_download/file (last visited Aug. 3, 2018).

[7] In a somewhat different context, the BOE estimated that the sale of non-taxable gasoline on one reservation reduced state taxable revenue by $1.5 to $2 million per year. Notice of Appeal by Interested Parties, In Re Notice of Decision Upon the Application of the Tule River Tribe of California, dated January 6, 2011, Department of the Interior, Bureau of Indian Affairs, Board of Indian Appeals, n. 5, *available at* https://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/tule-river-indian-tribe-1/IBIA%20Appeal.pdf/at_download/file (last visited Aug. 3, 2018). The revenue effects of an affirmance in this case would apply to all taxable fuel sales in non-Indian country, throughout the state.

that must use the roads in order to conduct its operations and activities. It is unclear whether the same logic employed by the court below would prevent New York from imposing its sales tax or its income tax on a Yakama business that delivers Yakama manufactured furniture or Yakama artwork in New York via the Lincoln Tunnel or the George Washington Bridge.

Nevertheless, because the decision will indisputably affect state fuel and tobacco taxes, we will focus on those tax systems.

II. State fuel and tobacco tax systems are highly interconnected and state administrators and taxpayers have worked together to achieve greater administrative uniformity.

Given that multiple companies may be involved in the sales of fuel and tobacco products (producers or growers, refiners or manufacturers, transporters, wholesalers, distributors, retailers, etc.), and given that the goods may transit multiple states before they are consumed, it is critical that this system work properly so that noncompliant sellers do not gain a competitive advantage by avoiding taxes, and so that the administrative and enforcement costs that might otherwise be imposed by multiple states are minimized.

In the fuel tax area, the Federation of Tax Administrators has "developed and continues to foster a very unique and very effective partnership

among the States, Industry, Federal and Foreign Governments regarding motor fuel tax administration."[8] As a recent report explains:

> Although there are many similarities, each state has its own unique set of tax laws, tax rates, report forms, definitions, exemptions, and compliance methods. These differences create problems in tax administration, regulation of interstate fuel movement, enforcement efforts and exchange of information among state revenue agencies and provide tax cheats with incentives to evade state fuel taxes. Federal Highway Administration (FHWA) studies show that gasoline tax evasion ranges from 3 to 7 percent of gallons consumed, and diesel tax evasion ranges from 15 to 25 percent. This means the states may be losing more than $2 billion annually to evasion.[9]

Unlike general sales taxes, fuel taxes are generally collected prior to the retail sale, a system which requires states and industry to cooperate on the

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[8] Report of the FTA Uniformity Committee (The Uniformity Book) - updated September 2017; Benefits of Motor Fuel Tax Section Activities, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/2017%20Uniformity%20Book.pdf (last visited Aug. 7, 2018).

[9] *Id.* at 1.

treatment of cross-border reporting, but has the advantage of being less susceptible to abuse. Uniformity also allows states to share information to ensure that taxes are being properly reported on cross-border sales. For example, almost all states receive fuel export or import information from the origin or destination states, respectively.[10]

Similarly, in the tobacco and cigarette tax areas, states have worked, in conjunction with tobacco companies, to make sure that tax systems are compatible from state to state so as to reduce contraband trade in untaxed products and so that taxes can be reported and collected efficiently.[11] The role of tobacco taxes, of course, is not simply to raise revenue but also to discourage use, especially by teenagers, and provide for health and societal costs.

If this Court upholds the ruling below, it will create uncertainty as to whether states can maintain this interwoven system or will need to make changes to it, if possible.

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[10] *See* Federation of Tax Administrators, Fuel Tax Section, 2018 EC Survey – Map Summary at 13-14, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/_2018%20EC%20Survey%20MAPS.pdf (last visited Aug. 7, 2018).

[11] See Federation of Tax Administrators, Tobacco Tax Section, Uniformity Guide, *available at* https://www.taxadmin.org/assets/docs/Tobacco/TOBACCO%20UNIFORMITY%20GUIDE%2008.03.17.pdf (last visited Aug. 7, 2018).

III. The holding below is based on a fundamentally flawed rationale and makes it impossible for states to know what taxes might be preempted.

State tax administrators, along with industry groups and taxpayers, have focused on creating consistent processes and procedures for measuring, reporting, and keeping track of products and the taxes owed. But it must also be noted that, especially in the fuel tax area, the particular imposition of taxes may vary somewhat in terms of exactly when the tax is triggered and exactly how and when various persons may be responsible for reporting and paying it. The precise statutory terminology used may also vary, even among states that are recognized as taking the same basic approach.[12]

This is important because—while the Washington Supreme Court determined that the imposition of the tax by Washington fell afoul of the treaty provision—as the dissent suggests and the respondent contends, this could be viewed as a matter of in-

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[12] For example, a report by the Federation of Tax Administrators, Tobacco Tax Section, demonstrates how the handful of approaches to imposing the legal incidence of the tax may correspond to a particular state's approach to sales of fuel to or by tribes or tribal members. See Native American Survey—September 2017, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/2017%20Complete%20Native%20American%20Survey.pdf (last visited Aug. 9, 2018).

terpretation.[13] It is true that other states might well interpret slightly different or even exactly similar statutory language differently. But that is not the source of the problem here. The source of the problem is that the holding of the Washington Supreme Court extends the precedent on which it relies beyond the breaking point—creating a distinction between allowable and prohibited taxes that will be impossible to implement. Rather than limiting the treaty provision's application to situations in which travel is unquestionably and directly the focus of the imposition, the court posits that there is a line to be drawn between improper taxes on "importation" and other taxes indirectly implicating travel that might be allowable. The court below concludes that:

> Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.

Cougar Den, Inc. v. Dep't of Licensing, 392 P.3d 1014, 1019 (2017). The court's fundamental reasoning is that "it was simply not possible for Cougar

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[13] Supplemental Brief for the Respondent at 7.

Den to import fuel without traveling or transporting that fuel on public highways." *Id.* at 1020.

This may appear to be a clear line, until one reads the dissent. "Without travel, most goods have no market." *Id.* at 1024 (Fairhurst, C.J., dissenting).

So, while the respondent argues that states might be able to avoid the violating the treaty provision at issue by simply amending their statutory language, we agree with the U.S. Solicitor General that it is unclear whether this will be possible. The line drawn by the Washington Supreme Court defies the type of clarity that would be needed for states to know what taxes are allowed. Indeed, it is not clear that, under the court's logic, there is any way for states to continue to impose a fuel tax prior to the retail level that would not be prohibited.

Similarly, tobacco taxes, and cigarette taxes in particular, are typically imposed on and collected at the point those products are introduced into the state, by affixing on the packs state tax stamps, which show that the cigarettes have complied with state law.[14] Whether the state uses the term "import," or "brings or causes to be brought into," or "ships or transports into," the logic of the holding below would appear to prohibit those taxes—even though transportation, itself, has nothing to do with the focus of the tax.

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[14] *See supra*, note 12.

We therefore urge the Court not to adopt so extreme an interpretation, or one that cannot be consistently and predictably applied. State tax administrators cannot appeal to this Court for its review of any potential amendment that might be necessary nor can they litigate every challenge or seek this Court's opinion on every shading of difference that might possibly affect the outcome.

CONCLUSION

The respondent will no doubt urge this Court to ignore the effects of its holding on state tax systems as irrelevant to any determination of what the treaty provision means. But no law, not even treaties, exists in a vacuum. To be effective, the law must be sufficiently clear so that it can be properly carried out. The decision below fails to meet this basic standard. We therefore ask the Court to overturn the Washington Supreme Court and provide the clarity that all the parties need.

Respectfully submitted,

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